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IN THE

Supreme Court of the United States

October Term, 1956

No. 582

SAMUEL ROTH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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SUBJECT INDEX

	PAGE
Petition for Rehearing	1
I. The framers of the Fifth Amendment intended that the states and the states alone should have power over such offenses as obscenity and seditious libel	2
II. All utterances, when unconnected with criminal conduct, are entitled to the protection of the First Amendment	7
Conclusion	15
Certificate	16

Citations

CASES:

Abrams v. United States, 250 U. S. 616, 631 [1919] .. 7

Adams Newark Theatre Co. v. Newark, 25 U. S. Law Week 3381 (June 24, 1957) .. 8

Alberts v. California, 25 U. S. Law Week 4539 (June 24, 1957) .. 7

Blockburger v. United States, 284 U. S. 299 (1932) .. 15

Butler v. Michigan, 352 U. S. 380 (1957) .. 8

Commonwealth v. Sharpless, 2 S. & R. (Pa.) 91 .. 6

Dennis v. United States, 341 U. S. 494 (1951) .. 9, 10, 14

International Brotherhood of Teamsters v. Vogt, Inc., 25 U. S. Law Week 4504 (June 17, 1957) .. 10

Kingsley Books, Inc. v. Brown, 25 U. S. Law Week 4557 (June 24, 1957) .. 8, 14, 15

Lightfoot v. United States, 350 U. S. 992 (1956), granting cert. to 228 F. 2d 861 (7th Cir.), 77 S. Ct. 1278 (1957) .. 8, 15

PAGE

CASES (cont'd):

Richmond v. United States, 25 U. S. Law Week 4475 (June 17, 1957) 9, 10, 14
Rosenberg v. United States, 344 U. S. 889 (1952) (concurring opinion) 15
Scales v. United States, 350 U. S. 992 (1956), granting cert. to 227 F. 2d 581 (4th Cir. 1955), 77 S. Ct. 1278 (1957) 8, 15
Schenck v. United States, 249 U. S. 47 (1919) 11
Schneiderman v. United States, 25 U. S. Law Week 4475 (June 17, 1957) 9, 10, 14
United States v. Hoffman, 137 F. 2d 416 (2d Cir. 1943) 15
United States v. Hudson and Goodwin, 11 U. S. (7 Cranch.) 32 (1812) 6
United States v. Rosenberg, 195 F. 2d 583 (2d Cir.), cert. denied 344 U. S. 838 (1952) 15
United States v. Trypuc, 136 F. 2d 900 (2d Cir. 1943) 15
Yates v. United States, 25 U. S. Law Week 4475 (June 17, 1957) 9, 10, 14

CONSTITUTION AND STATUTES:

Art. I, §5 of the Delaware Constitution of 1792 3
Art. XIII, § 1 of the South Carolina Constitution of 1790 3
Art. IX, §7 of the Pennsylvania Constitution of 1790 . 3
First Amendment 1, 2, 4, 6, 7, 11, 14, 15, 16
Fifth Amendment 1
Tenth Amendment 1
18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183 ..... 1, 16
Chapter I, § 15, Constitution of 1786 of the State of Vermont 2

PAGE

OTHER AUTHORITIES:

Annals of Congress, 5th Cong., 2d Sess. (1798) 4, 5

1 Annals of the Congress of the United States 439 (Gales Comp. 1834) 6

3 Annals of Congress (1799) 12

A Bill for Establishing Religious Freedom 12, 14

A Fragment On Government (1776) 14

Brant, James Madison Father of the Constitution 267 (1950) 6

Letters to the Honourable Mr. Justice Blackstone 62-63 (2d ed. 1771) 13

Montesquieu, L'Esprit des Lois (1748 Bk. 12, c. 12) .. 14

Sedition Act of 1798 4

2 Poore, The Federal and State Constitutions (2d ed. 1878) 2, 3, 4

2 The Papers of Thomas Jefferson 545-56 (Boyd ed. 1950) 12

12 Laws of Virginia, 84, 86 (Hening 1823) 12

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PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner herein prays for a rehearing and reversal of the decision of this Court of June 24, 1957, 25 U. S. Law Week 4539, affirming a judgment of the Court of Appeals for the Second Circuit, 237 F. 2d 796 (1956), affirming a judgment of the District Court for the Southern District of New York, which imposed on petitioner the harsh sentence of five (5) years plus a fine of Five Thousand ($5,000) Dollars for the violation of a federal obscenity statute, 18 U. S. C. § 1461, 62 Stat. 768, 69 Stat. 183, the constitutionality of which the petitioner challenged under the First and Fifth Amendments and in this Court under the First, Fifth, Ninth and Tenth Amendments. This petition for rehearing is based upon two substantial grounds available to the petitioner although not previously presented.

I.

The framers of the First Amendment intended that the states and the states alone should have power over such offenses as obscenity and seditious libel.

The majority opinion states:

> "The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes." 25 U. S. Law Week at 4540-41.

This but emphasizes the fact that the framers of the First Amendment intended the states and the states alone to have power over such offenses as obscenity and seditious libel.

The ten states to which the majority opinion refers are Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, South Carolina, Vermont, and Virginia. These ten states reduce to nine as of the date when the first Congress proposed the first Ten Amendments (September 25, 1789); for the constitution of one of them, Delaware, to which reference is made, dates from 1792.

Moreover, these state constitutional provisions were not always in as sweeping terms as the First Amendment. For example, the Constitution of 1786 of the State of Vermont provided in Chap. I, § 15:

> "That the people have a right of freedom of speech and of writing and publishing their sentiments, concerning the transactions of government—and therefore the freedom of the press ought not to be restrained." 2 Poore, *The Federal and State Constitutions*, 1869 (2d ed. 1878).

Furthermore the state constitutional provisions at times contained express exceptions. For example, the Pennsylvania constitution of 1790 contained an express exception for seditious libel. This constitution provided in Art. IX, § 7:

> "That the printing-presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government, and no laws shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." 2 Poore, *The Federal and State Constitutions*, 1554 (2d ed. 1878).

The Delaware Constitution of 1792 contained a similar exception. Art. I, § 5 provided:

> "The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty. In prosecutions for publications investigating the proceedings of officers, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury may determine the facts and the law, as in other cases." 2 Poore, *The Federal and State Constitutions*, 278 (2d ed. 1878).

The South Carolina constitution of 1790 contained an express exception for acts of licentiousness. Art. XIII, § 1 provided:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or

> preference, shall forever hereafter be allowed within this State to all mankind: *Provided*, That the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." 2 Poore, *The Federal and State Constitutions*, 1632-33 (2d ed. 1878).

It is interesting to note that the constitutions of two states, Pennsylvania and Delaware, contained express exceptions in their free speech guarantees for the offense of sedition. This supports the position of such men as Thomas Jefferson, James Madison, John Nicholas, Nathaniel Macon, Edward Livingston, Albert Gallatin, and John Taylor of Caroline in their attack on the Sedition Act of 1798 that the crime of seditious libel fell only and exclusively within the area of state power. By way of contrast the First Amendment provided in unqualified language that "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

In our brief for petitioner (pp. 10-12) and our reply brief (pp. 9-12) we quoted Jefferson and Madison in this regard. Other leaders took the same position. John Nicholas of Virginia in arguing against the passage of the Sedition Act of 1798 stated:

> "* * * He had heard it said that all the States take cognizance of offenses of this sort. But does that give the power to the General Government? Because the States declare certain things offences, have the General Government power over the like offences? If so, it would have a concurrent power with all the State Governments, which, he believed, would be a novel idea. Indeed, he was utterly at a loss to find any ground upon which to found a law of this kind. He was confident there was none." *Annals of Congress* 2142, 5th Cong., 2d Sess. (1798).

Nathaniel Macon of North Carolina argued:

> "* * * He thought this subject of the liberty of the press was sacred, and ought to be left where

> the Constitution had left it. The States have complete power on the subject, and when Congress legislates, it ought have confidence in the States, as the States ought also to have confidence in Congress, or our Government is gone * * *." *Annals of Congress* 2152, 5th Cong., 2d Sess. (1798).

Edward Livingston of New York similarly stated:

> "* * * Every man's character is protected by law, and every man who shall publish a libel on any part of the Government, is liable to punishment. Not, said Mr. L., by laws which we ourselves have made, but by laws passed by the several States. And is not this most proper? * * * " *Annals of Congress* 2153, 5th Cong., 2d Sess. (1798).

One more observation is pertinent here, and that is that the states did not always observe their own constitutional provisions. As Madison pointed out when he submitted his proposed amendments to the first Congress in June 1789:

> "* * * It is true, there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislature or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. Besides this security there is a great probability that such a declaration in the federal system would be enforced; because the State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power, than any other power on earth can do; and the greatest opponents to a Federal Government admit the State Legislatures to be sure

guardians of the people's liberty * * *." 1 *Annals of the Congress of the United States* 439 (Gales Comp. 1834).

"Here," in the words of Irving Brant, "was not only the doctrine of judicial review but the lusty germ of the Virginia and Kentucky Resolutions." Brant, *James Madison Father of the Constitution* 267 (1950).

A little over a decade after Madison in his *Report* on the Virginia Resolution of 1798 cut the ground from under the argument that Congress had power to punish crime under the common law of England, this Court in *United States* v. *Hudson and Goodwin*, 11 U. S. (7 Cranch.) 32 (1812), decided in accordance with the position which Madison had taken in his *Report*. That case involved an indictment for a libel on the President and the Congress. This Court in ruling against the indictment specifically stated that "although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and a general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition." At 32.

It is thus clear that the framers of the First Amendment intended the crime of seditious libel to be solely and exclusively within state power. *A fortiori* they would have taken the same position with reference to such offenses as blasphemy and profanity, and later still obscenity. As we pointed but in our reply brief (pp. 7-8) the first reported case on obscenity in this country was not decided until 1815 (*Commonmealth* v. *Sharpless*, 2 S. & R. (Pa.) 91), almost a quarter of a century after the First Amendment was adopted.

II.

All utterances, when unconnected with criminal conduct, are entitled to the protection of the First Amendent.

At the 1956 term this Court in a series of cases had before it questions of the meaning and scope of "the sweeping command" (*Abrams v. United States*, 250 U. S. 616 631 [1919].) (dissenting opinion of Justice Holmes) of the First Amendment that "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." The questions which these cases presented in one aspect or another concerned the problem of the circumstances, if any, under which speech that has not yet resulted in criminal deeds can constitutionally be punished, restrained or regulated. Five cases involved obscenity statutes. These covered the field, on a federal as well as a state level, in the criminal as well as the civil area. In the instant case the Court sustained the validity of a federal criminal obscenity statute and, in *Alberts v. California*, 25 U. S. Law Week 4539 (June 24, 1957), a state criminal obscenity statute. The Court in an opinion by Mr. Justice Brennan held "that obscenity is not within the area of constitutionally protected speech or press." At 4542. Mr. Justice Black and Mr. Justice Douglas dissented in both cases, and Mr. Justice Harlan in the instant case. Mr. Justice Douglas in his dissent, in which Mr. Justice Black concurred, stated:

> "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." At 4551.

Mr. Justice Harlan dissented on the ground that the First Amendent's prohibitions placed a greater restriction on federal power than the Fourteenth Amendment's provision, "nor shall any State deprive any person of life,

liberty, or property, without due process of law," placed on state power. In *Kingsley Books, Inc.* v. *Brown*, 25 U. S. Law Week 4557 (June 24, 1957), the Court in a five to four decision upheld a New York statute which provided for civil non-jury injunctive proceedings against obscene publications. Mr. Justice Frankfurter delivered the Court's opinion. He did not think that the statute constituted proscribed prior restraint. Mr. Justice Douglas and Mr. Justice Black thought that it did. Mr. Chief Justice Warren in his dissent stated: "It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature. To do otherwise is to impose a prior restraint and hence to violate the constitution." At 4760. In *Adams Newark Theatre Co.* v. *Newark*, 25 U. S. Law Week 3381 (June 24, 1957), the Court on the authority of the preceding three cases in a *per curiam* decision sustained the validity of a Newark ordinance which forbade stage performers to expose certain parts of their bodies and to use profane, lewd or lascivious language. In the fifth case, *Butler* v. *Michigan*, 352 U. S. 380 (1957), the Court unanimously invalidated a state statute which made criminal the general sale or distribution of literature "tending to incite minors."

Six cases involved judgments of conviction under the Smith Act against leaders of the American Communist Party. Two of these cases, *Scales* v. *United States*, 350 U. S. 992 (1956), *granting cert.* to 227 F. 2d 581 (4th Cir. 1955), and *Lightfoot* v. *United States*, 350 U. S. 992 (1956), *granting cert.* to 228 F. 2d 861 (7th Cir.), arose out of prosecutions against individuals under that provision of the act which makes it a crime to be a member of an organization that advocates the forcible overthrow of the government, "knowing the purposes thereof." The Court heard arguments in these two cases but restored them to the docket for reargument at the 1957 term. *Scales* v. *United States*, *Lightfoot* v. *United States*, 77 S. Ct. 1278 (1957).

The remaining four of these six cases arose out of conspiracy prosecutions. Three, *Yates* v. *United States*, *Schneiderman* v. *United States*, and *Richmond* v. *United States*, 25 U. S. Law Week 4475 (June 17, 1957), resulted from a judgment of conviction against fourteen persons in the Los Angeles prosecution. The Court reversed, ordering an acquittal as to five of the defendants and a new trial as to the remaining nine. Mr. Justice Harlan wrote the Court's opinion. Mr. Justice Brennan and Mr. Justice Whittaker, who were not members of the Court when these cases were argued, took no part in their consideration or decision. Mr. Justice Black and Mr. Justice Douglas concurred in part and dissented in part: they would have directed the acquittal of all of the defendants. Mr. Justice Clark dissented. One of the grounds of the reversal was the trial judge's refusal to charge, in terms of the trial court's charge in *Dennis* v. *United States*, 341 U. S. 494 (1951), that the advocacy of violent overthrow "be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit." 341 U. S. at 512. Instead the trial judge charged:

> "The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence." 25 U. S. Law Week at 4479.

The Court felt that this instruction defined advocacy too much in terms of the teaching of abstract doctrine rather than incitement to illegal action: "The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court, beginning with

Fox v. *Washington* * * * and *Schenck* v. *United States* * * * *", 25 U. S. Law Week at 4480. Mr. Justice Black and Mr. Justice Douglas dissented on the same ground as in the *Dennis* case, that the advocacy provision of the Smith Act violated the First Amendment. Mr. Justice Black, in an opinion in which Mr. Justice Douglas joined, wrote:

> "I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal." 25 U. S. Law Week 4487.

Mr. Justice Clark could not draw the distinction which the Court did between the charge in the *Dennis* case and that in the *Yates, Schneiderman,* and *Richmond* cases. He wrote:

> "While there may be some distinctions between the charges, as I view them they are without material difference. I find, as the majority intimates, that the distinctions are too 'subtle and difficult to grasp.'" 25 U. S. Law Week 4490. (June 24, 1957).

In the Sixth Communist case, *Wellman* v. *United States,* 25 U. S. Law Week 3382 (June 24, 1957), arising out of a conspiracy conviction in Detroit, the Court vacated the judgment of affirmance of the Court of Appeals for the Sixth Circuit, and remanded the case for further consideration in the light of the Court's decision in the *Yates, Schneiderman,* and *Richmond* cases.

One case dealt with a state anti-picketing statute: in *International Brotherhood of Teamsters* v. *Vogt, Inc.,* 25 U. S. Law Week 4504 (June 17, 1957), the Court in a five to three decision sustained the validity of a Wisconsin statute which prohibited even peaceful picketing when done for organizational purposes. Mr. Justice Douglas, in a dissenting opinion in which Mr. Chief Justice Warren and Mr. Justice Black joined, urged that speech when unconnected with conduct should be wholly free: "I would return to the test enunciated in *Giboney*—that picketing can be regulated or prohibited only to the extent that it forms

an essential part of a course of conduct which the State can regulate or prohibit." 25 U. S. Law Week at 4507.

These cases call for a re-examination of the circumstances leading to the adoption of the federal Bill of Rights, the framers' intent in drafting the First Amendment, its subsequent construction, particularly the development and application of Mr. Justice Holmes' clear and present danger test, which he enunciated in *Schenck* v. *United States*, 249 U. S. 47 (1919), and the respective areas of federal and state power. It is submitted that at least so far as Congress is concerned speech is as free as thought, and that unless and until speech becomes a part of a course of conduct which Congress can restrain or regulate no federal legislative power over it exists. State power, despite the Fourteenth Amendment, may be somewhat more extensive. Certainly the framers of the First Amendment intended that it should be.

In our reply brief (pp. 10-12) we called attention to Madison's criticism in his *Report* of the bad tendency doctrine and his suggestion that federal power was limited to acts and could not apply to speech alone.

On the floor of Congress John Nicholas of Virginia pointed out the fallacy of the bad tendency doctrine and the danger in the position which gave Congress the power to punish other than acts. The occasion was the debate on the report of a select committee on petitions praying for a repeal of the alien and sedition laws. Nicholas cautioned:

> The suggestion on which the authority over the press is founded, is, that seditious writings have a tendency to produce opposition to the Government. What has a greater tendency to fit men for insurrection and resistance to Government, than dissolute, immoral habits, at once destroying love of order, and dissipating the fortune which gives an interest in society?

> "The doctrine that Congress can punish any act which has a tendency to hinder the execution of the laws, as well as acts which do hinder it, will, therefore, clearly entitle them to assume a general guardianship over the morals of the people of the United States." 3 *Annals of Congress* 3004-05 (1799).

Such a result was of course contrary to anything this country's founders had in mind.

Jefferson had made these points earlier and in a more direct and even stronger fashion. In his draft of *A Bill for Establishing Religious Freedom*, which he introduced into the Virginia Assembly in 1779, and which passed that body in 1785, he stated:

> "* * * that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; * * *." 2 *The Papers of Thomas Jefferson* 545-46 (Boyd ed., 1950); 12 *Laws of Virginia*, 84, 86 (Hening 1823).

And before Jefferson drafted this bill the Rev. Philip Furneaux, a dissenting divine, in one of a series of famous letters to Blackstone, which were published in book form in London in 1770, and in Philadelphia three years later, had eloquently urged the same approach:

> "If it be objected, that when the tendency of principles is unfavourable to the peace and good order of society, as it may be, it is the magistrate's duty then, and for that reason, to restrain them by penal laws: I reply, that the tendency of principles,

tho' it be *unfavourable*, is not *prejudicial* to society, till it issues in some *overt acts* against the public peace and order; and when it does *then* the magistrate's authority to punish commences; that is, he may punish the *overt acts*, but not the *tendency*, which is not actually hurtful; and, therefore, his penal laws should be directed against *overt acts only*, which are detrimental to the peace and good order of society, let them spring from what principle they will; and not against *principles* or the *tendency* of principles.

"The distinction between the tendency of principles, and the overt acts arising from them is, and cannot but be, observed in many cases of a *civil* nature; in order to determine the bounds of the magistrate's power, or at least to limit the exercise of it, in such cases. It would not be difficult to mention customs and manners, as well as principles, which have a tendency unfavourable to society; and which, nevertheless, cannot be restrained by penal laws, except with the total destruction of civil liberty. And here the magistrate must be contented with pointing his penal laws against the evil overt acts resulting from them * * *. Punishing a man for the *tendency* of his principles, is punishing him *before* he is guilty, for fear he *should* be guilty." *Letters to the Honourable Mr. Justice Blackstone* 62-63 (2d ed. 1771).

So, too, had Montesquieu, the oracle of the founding fathers, and Jeremy Bentham; although Montesquieu had added a nullifying qualification. Montesquieu in his *L'Esprit des Lois* (1748) in a chapter entitled, "Of Indiscreet Speeches," had written:

"Words do not constitute an overt act * * *. Words carried into action assume the nature of that action. Thus a man who goes into a public market-place to incite the subject to revolt, incurs the guilt of high treason, because the words are joined to the action, and partake of its nature. It is not the words that are punished, but an action in which words are employed. They do not become criminal, but when they are annexed to a criminal action: everything is con-

> founded, if words are construed into a capital crime, instead of considering them only as a mark of that crime." Bk. 12, c. 12.

The framers of the First Amendment were wise enough not to follow Montesquieu in his exception.

Bentham in his *A Fragment On Government* (1776) which was a criticism of Blackstone's exposition in his *Commentaries* on the nature of sovereignty, in explaining the difference between a free and a despotic government, stated that one of the distinguishing circumstances lay in "the security with which malcontents may communicate their sentiments, concert their plans, and practice every mode of opposition short of actual revolt, before the executive power can be legally justified in disturbing them." At 95 (Harrison ed. 1948).

Jefferson's classic statement from his draft of *A Bill for Establishing Religious Freedom* did not go wholly unnoticed. Mr. Justice Black in his concurring and dissenting opinion in the *Yates*, *Schneiderman* and *Richmond* cases, in which Mr. Justice Douglas joined, quoted the latter part of it. 25 U. S. Law Week at 4487. So, too, did Mr. Justice Douglas in his dissenting opinion in the *Dennis* case. 341 U. S. at 590.

It is submitted that it was Jefferson's and Madison's distinction between speech and conduct, between the word and the criminal deed, which Mr. Chief Justice Warren had in mind in the instant case when he stated in his concurring opinion:

> "The conduct of the defendant is the central issue, not the obscenity of a book or picture." 25 U. S. Law Week at 4545.

It is further submitted that it was this distinction which he had in mind in *Kingsley Books Inc.* v. *Brown*, 25 U. S.

Law Week 4557 (June 24, 1957), when he stated in his dissenting opinion in that case:

> "It is the conduct of the individual that should be judged, not the quality of art or literature." 25 U. S. Law Week 4560.

The Court should re-examine its interpretation and application of the First Amendment, and rule that under it all utterances, when unconnected with criminal conduct, are entitled to protection.

CONCLUSION

We respectfully pray that this petition for rehearing be granted and that this case, like *Scales* v. *United States*, 77 S. Ct. 1278 (1957), and *Lightfoot* v. *United States*, 77 S. Ct. 1278 (1957), be restored to the docket for reargument at the 1957 term.

While the severity of the sentence in this case (and of its severity there can be no doubt) is not open to review [see *Blockburger* v. *United States*, 284 U. S. 299 (1932); *Rosenberg* v. *United States*, 344 U. S. 889 (1952) (concurring opinion); *United States* v. *Rosenberg*, 195 F. 2d 583 (2d Cir.), *cert. denied*, 344 U. S. 838 (1952)], nevertheless the harshness of the sentence should underline the substantial nature of the two grounds presented in this petition for rehearing. *Cf. United States* v. *Hoffman*, 137 F. 2d 416 (2d Cir. 1943); *United States* v. *Trypuc*, 136 F. 2d 900 (2d Cir. 1943).

Upon rehearing, the judgment of this Court affirming the judgment of the Court of Appeals for the Second Circuit should be reversed and the federal obscenity statute,